82-159

Supreme Court, U.S.
FILED
JUL 29 1982
ALEXANDER L. STEVAS
CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., INC.; MICHAEL DEY LIN-

(OVER)

On Appeal From The Court Of Appeals Of New York

JURISDICTIONAL STATEMENT

HEIM, KOLDIN, CANTER & LEVINE
Attorneys for Appellants
305 Montgomery Street
Syracuse, New York 13202
(315) 472-8845

Leonard C. Koldin, Esq.
Dated: July 16, 1982

COLN-MERCURY, INC.; MO-RU OF DEWITT, INC., doing business under the name and style of Burger King; ENZA MUFFLERS, INC., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, INC., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, INC., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, INC.; DEWITT CAR WASH, INC.; PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, INC.; DEWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS — SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DEWITT,

Appellee.

QUESTIONS PRESENTED

By this appeal, appellants present the following questions and issues to this Court:

1. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it discriminates against certain non-commercial and commercial speech, discriminates against certain non-commercial and commercial property owners and users, affords preferential treatment to certain commercial and industrial property owners and users and denies appellants equal protection of the law.

2. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it denies appellants their constitutional right of freedom of speech by requiring the discontinuance of and removal of on-site free-standing business identification signs, thus depriving appellants of an operative form of advertising and of business identification.

3. Whether Section 53-30 of the Town Code of the Town of Dewitt is unconstitutional on its face and as applied to the appellants in that it deprives the appellants of their Fifth Amendment right to property without due process of law and represents a taking of property without due process of law and without just compensation.

4. Whether the appellants were denied due process of law in the Courts below by the summary action taken by said Courts without affording the appellants an evidentiary hearing on the constitutionality of Section 53-30 of the Town Code of the Town of Dewitt as applied to them.

PARTIES

The parties to this appeal in this Court are the same as those set forth in the caption of this Jurisdictional Statement.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
List of Parties	*i*
Table of Cases	*iii*
Opinions Below	3
Jurisdiction	3
Constitutional Provisions, Statutes, Ordinances and Regulations Involved	5
Statement of the Case	6
Substantiality of Questions	10
Conclusion	17

APPENDIX

Memorandum Decision of the Court of Appeals of New York, dated May 4, 1982	A-1
Remittitur of the Court of Appeals of New York, dated May 4, 1982	A-4
Order of Appellate Division of the Supreme Court of New York, Fourth Judicial Department, Affirming Decision and Order of Supreme Court, Onondaga County, entered February 13, 1981	A-5
Order of Supreme Court, Onondaga County, dated December 6, 1979, entered December 7, 1979	A-7
Decision of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, dated August 17, 1979	A-9
Notice of Appeal to the Supreme Court of the United States	A-15
Section 53-30, Town Code of the Town of DeWitt, Onondaga County, New York	A-19

TABLE OF CASES

	Page
Bates, et al. v. State Bar of Arizona, 433 U.S. 350 (1977)	12
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	12
Matter of Cromwell v. Ferrier, 19 NY2d 263 (1967)	16
Metromedia, Inc., et al. v. City of San Diego, et al., 453 U.S. 490 (1981)	11
Modjeska Sign Studios, Inc. v. Berle, 43 NY2d 468 (1977)	15
Suffolk Outdoor Advertising Co., Inc. v. Hulse, 43 NY2d 483 (1977)	13
United Adv. Corp. v. Borough of Raritan, 11 N.J. 144	14
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)	12

In The

Supreme Court of the United States

OCTOBER TERM, 1982

No.

SYRACUSE SAVINGS BANK; RAYMOUR FURNITURE COMPANY, INC.; FIRESTONE TIRE AND RUBBER COMPANY, INC.; COLE MUFFLER, INC.; CARROLLS DEVELOPMENT CORPORATION, doing business under the name and style of Cinema East and Mini One Theatres; SLOTNICK ENTERPRISES, INC., doing business under the name and style of DeWitt Drive In; FRANKLIN FURNITURE DEWITT CORP.; DEWEY FURNITURE CORPORATION, doing business under the name and style of Roth Bros. Manor House; DANA ELSTON, doing business under the name and style of International House of Pancakes; BRANG CO., INC.; MICHAEL DEY LINCOLN-MERCURY, INC.; MO-RU OF DEWITT, INC., doing business under the name and style of Burger King; ENZA MUFFLERS, INC., doing business under the name and style of Midas Shops; DEWITT HIGHWAY HOTEL, INC., doing business under the name and style of DeWitt Ranch Motel; HOWED DISTRIBUTORS, INC., doing business under the name and style of Kids Town; MACARTNEY & TOLLES, INC., doing business under the name and style of Kentucky Fried Chicken; SOO-LIN RESTAURANT CORP.; ROCHESTER SHOE STORE OF DEWITT, INC.; SYRACUSE DONUT, INC., doing business under the name and style of Dunkin Donuts; DAVID F. KROFT, doing business under the name and style of Whale of a Wash of DeWitt; THE WARDROBE FORMALWEAR, INC.; DEWITT CAR WASH, INC.;

PETER'S GROCERIES, INC.; CAPTAIN AHAB'S SEAFOOD GALLEY, INC.; MAY ITALIA, INC., doing business under the name and style of Chef Italia Restaurant; GREGORY BANOS, doing business under the name and style of DeWitt Plaza; COLOR TILE SUPERMARTS, INC.; DEWITT BICYCLE CO., INC.; HELENE KAZACOS, doing business under the name and style of Carousel Hair Stylists; DEWITT SPORT SHOP, LTD.; COMPUTER SHOP OF SYRACUSE, INC.; LUND'S MEN'S SHOP, INC.; M. GOLDBERG & SONS — SYRACUSE, INC.; TILE & CARPET TOWN EAST, INC.; B.W. STREETER, INCORPORATED, doing business under the name and style of Arby's; HARVEY SHURE, doing business under the name and style of H.J.S. Enterprises (Harvey's Shopping Plaza); RITE AID OF NEW YORK, INC.; and FRIENDLY ICE CREAM CORP.,

Appellants,

vs.

TOWN OF DEWITT,

Appellee.

On Appeal From The
Court Of Appeals Of New York

JURISDICTIONAL STATEMENT

The appellants named-above appeal from the Decision, Order and Judgment of the Court of Appeals of the State of New York, dated and entered in said Court on May 4, 1982, holding that Section 53-30 of the Town Code of the Town of Dewitt is Constitutional as applied to commercial speech and as not being violative of appellants' Constitutional rights of equal protection of the laws and the taking or denial of property

without just compensation or due process of law, as guaranteed by the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

Appellants submit this Jurisdictional Statement in support of this Court's entertaining jurisdiction herein.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals of the State of New York, which is set forth in its entirety in the Appendix hereto, is reported at *56 NY2d 671*. The written Decision dated August 17, 1979 of Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, New York, which was adopted in its entirety by the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, is not a reported Decision. The text thereof is also set forth in its entirety in the Appendix hereto.

JURISDICTION

At issue in this litigation is the constitutionality of Section 53-30 of the Town Code of the Town of Dewitt, Onondaga County, New York. That ordinance, with certain exceptions, requires the removal of and precludes the erection of all free-standing identification signs in the Town of Dewitt, Onondaga County, New York. The law applies both to permanent on-premises and off-premises identification signs of both a commercial and non-commercial nature.

Appellants commenced this action in the Supreme Court of New York, in and for the County of Onondaga, for a declaratory judgment pursuant to Section 3001 of the Civil Practice Law and Rules of the State of New York. By Order entered in the Office of the Clerk of Onondaga County December 7, 1979, the Supreme Court of New York, Honorable John R. Tenney, Justice of the Supreme Court

presiding, granted appellee's motion for summary judgment, dismissing appellants' Complaint.

By Order entered in the Office of the Clerk of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, February 13, 1981, the Appellate Division unanimously affirmed the dismissal on Judge Tenney's written Decision dated August 17, 1979.

By Memorandum Decision rendered May 4, 1982, the Court of Appeals of New York modified the lower Court to the extent of declaring the ordinance constitutional as applied to commercial speech and, as modified, affirmed the Appellate Division.

In so doing, the Court of Appeals held that said ordinance did not violate appellants' constitutionally guaranteed rights of free speech or equal protection of the law, and did not constitute a taking or denial of property or property rights without due process of law or just compensation.

On June 11, 1982, and within ninety (90) days of the Decision, Order and Judgment of the Court of Appeals, appellants duly filed their Notice of Appeal therefrom to this Court, said Notice of Appeal being filed with the Court of Appeals of the State of New York and with the Supreme Court of New York, Onondaga County, the Court to which the Court of Appeals remitted this matter pursuant to Rule 5524 of the Civil Practice Law and Rules of the State of New York.

This appeal is taken pursuant to 28 U.S.C. 1257 (2) in that this is an appeal from a final judgment or decree rendered by the highest State Court in the State of New York in which a decision could be had and there is drawn in question the validity of a statute, law or ordinance, to wit, Section 53-30 of the Town Code of the Town of Dewitt, Onondaga County, New York, which appellants allege is repugnant to the Constitution

of the United States. The Decision of the Court of Appeals was in favor of its validity.

The constitutional issues herein were raised by appellants at the earliest stages of this proceeding, with sufficient allegations being contained in and set forth in their Complaint accompanying the Summons served upon the appellee.

CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND REGULATIONS INVOLVED

First Amendment, United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added)

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.*" (Emphasis added)

Fourteenth Amendment, Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added)

Chapter 53, Section 53-30, Town Code of the Town of Dewitt, Onondaga County, New York

The text of Chapter 53 is set forth in the Appendix hereto.

STATEMENT OF THE CASE

On or about March 26, 1973, the appellee (defendant below), Town of Dewitt, a municipal corporation in the County of Onondaga, State of New York, enacted an amendment to Section 53-30 of the Dewitt Town Code, said amended Section being designated "Sign Ordinance Regulations", sometimes hereinafter referred to as the Sign Ordinance. The Sign Ordinance sets forth certain limitations, restrictions and proscriptions applicable to signs in the Town of Dewitt, including, *inter alia*, the prohibition against both on-site (accessory) and off-premises (non-accessory) free-standing identification signs in the Town of Dewitt. This proscription against free-standing signs is applicable to non-commercial as well as commmercial signs and was enacted solely for aesthetic purposes.

The Ordinance specifically relieves certain classes of commercial property users from the proscription against permanent free-standing signs. Those exceptions include certain shopping centers, enclosed shopping malls, and industrial enterprises where the free-standing sign identifies industrial activity conducted on the premises. (A-21, A-22, A-25)

Other than those limited commercial exceptions, and certain signs of a temporary nature, (A-23) free-standing, on-site and

off-site signs in the Town of Dewitt are prohibited by the Sign Ordinance.

The appellants herein (plaintiffs below) each owns or maintains one or more business establishments or commercial properties in either a Business District, Business Transitional District, or an Industrial District in the Town of Dewitt. In the conduct of their respective businesses, and as an incident thereto, the appellants legally erected, and have legally maintained, free-standing accessory signs on their business premises for both advertising and property location and identification purposes. The appellants are representative of a cross-section of businesses in the Town of Dewitt, including banks, restaurants, theatres, gas stations, retail stores, small shopping centers and other service oriented stores. In some instances, appellants permit the use of their premises for non-commercial, civic oriented programs, messages and promotions.

The appellants, and others similarly situated in the Town of Dewitt, have expended millions of dollars developing the business locations in the Town of Dewitt in reliance upon the availability of free-standing identification signs which were permitted at the time of development. In many instances, because of the set backs and positions of buildings in relation both to the street lines and the flow of traffic, the signs have become an integral part of the developed properties and the businesses cannot be adequately identified or located without the free-standing signs.

The Sign Ordinance provides an amortization period during which non-conforming property owners and users were to have come into compliance with the regulations. The amortization period terminated on January 1, 1978. No administrative procedure or remedy is provided for in the Sign Ordinance to extend the amortization period.

By Summons and Complaint dated July 28, 1978, the plaintiffs commenced an action for declaratory judgment in the

Supreme Court of New York, County of Onondaga, asking the Court to declare the Dewitt Sign Ordinance unconstitutional on its face and as applied to the appellants on the grounds that the Ordinance: (1) unfairly and unreasonably discriminates against the appellants and denies appellants equal protection of the law; (2) represents an unlawful taking of appellants' property and property rights without due process of law or just compensation and a taking and denial of appellants' right to carry on their businesses in the Town of Dewitt without due process or just compensation; (3) denies appellants their right of free speech and expression; and (4) was enacted by the Dewitt Town Board in excess of its lawful police powers.

In a Decision dated August 17, 1979, the Honorable John R. Tenney, Justice of the Supreme Court, Onondaga County, granted the appellee's motion for summary judgment thereby summarily dismissing the appellants' Complaint without a hearing and without affording the appellants an opportunity to substantiate the allegations contained in their Complaint with respect to the unconstitutionality of the Sign Ordinance, both on its face and as applied to them.

In his Decision, Judge Tenney made no specific findings on appellants' equal protection, due process and free speech allegations. With respect to the appellants' allegations concerning the denial of property and property rights without just compensation, the Court found that the amortization period provided for in the Ordinance was reasonable as a matter of law. The Court also determined that the Ordinance, which was enacted solely for aesthetic purposes, was a valid exercise of the municipality's police power.

Judge Tenney's Decision of August 17, 1979, was made an Order of that Court and entered on December 7, 1979.

Appellants thereupon appealed the said Decision and Order to the Appellate Division of the Supreme Court of New York, Fourth Judicial Department. The Appellate Division

unanimously affirmed the lower Court upon Judge Tenney's Decision on February 13, 1981.

By Order of the Court of Appeals of the State of New York entered on September 10, 1981, the appellants were granted leave to appeal the Appellate Division's Order to that Court.

By Memorandum Decision dated and entered May 4, 1982, the Court of Appeals of the State of New York modified the Appellate Division to the extent of declaring the Ordinance constitutional as applied to commercial speech and, as modified, affirmed the Appellate Division. The Court of Appeals, in its Decision, determined that in considering the Ordinance in the abstract, and without considering any impact on the appellants, it perceived no error made by the lower Court in upholding the constitutionality and validity of the Ordinance.

Addressing specific issues, the Court of Appeals found that the appellants lacked standing to raise any constitutional First Amendment argument of overbreadth to challenge the Ordinance to the extent that it regulated non-commercial speech. With reference to the application of the Ordinance to commercial speech, the Court could not conclude that the near total proscription of free-standing signs or the regulation of on-building facade signs did not constitute, on the face of the Ordinance, a permissible constraint only as to location and manner.

The Court further found that the record lacked proof that the amortization period provided for in the Ordinance was impermissibly short and that the record lacked admissible evidence to justify an evidentiary hearing as to the constitutionality of the Ordinance as applied to the appellants. It must be emphasized at this point, however, that the lower Court precluded the appellants from making such evidence available to the record by summarily dismissing the appellants' Complaint without a hearing as to any issue.

The Court of Appeals did not specifically address the issue raised by the appellants that the Ordinance was discriminatory and denied the appellants equal protection of the law. The Memorandum Decision of the Court of Appeals dated May 4, 1982, is set forth in its entirety in the Appendix hereto.

Appellants appeal said Decision, Order and Judgment to this Court.

THE QUESTIONS ARE SUBSTANTIAL

I

The Dewitt Sign Ordinance, on its face and as applied, denies appellants and all others similarly situated equal protection of the law by unlawfully favoring certain types of commercial messages while prohibiting non-commercial messages and certain other types of commercial messages.

For example, the Dewitt Sign Ordinance, which was enacted purely for aesthetic purposes, permits enclosed shopping malls to erect and maintain permanent free-standing business identification signs while denying that right to adjoining property owners and lessees, whether they are of a commercial or non-commercial nature. In the Town of Dewitt, for instance, Shoppingtown Mall (the only covered mall in the Town of Dewitt) is entitled to erect and maintain three (3) on-site, free-standing identification signs while the Dewitt Community Church — directly across the street — is not permitted to erect or maintain even one (1) permanent free-standing identification sign, regardless of the message, including the dates or times of its services or the announcement of a church function.

Similarly, Sections 53-30(A)(11)(b) and (c) provide that certain non-enclosed shopping centers are permitted to erect and maintain free-standing shopping center identification signs, the number of which depends upon the number of business establishments or the total gross floor area of the

shopping center. The small, individually owned retail establishment on an adjoining property, however, is not permitted to maintain such a sign, nor is a non-commercial property owner within the same business or business transitional district permitted to maintain such a sign.

Section 53-30E of the Dewitt Sign Ordinance, furthermore, provides that in an industrial district, an industrial enterprise may maintain up to three (3) permanent free-standing identification signs on its premises "for the identification of industrial activity conducted on the premises" and such signs may total up to one thousand (1,000) square feet in area. Since the Ordinance specifically states that such free-standing signs are permitted to identify "industrial activity" only, it follows that other types of activity, such as retail sales, pharmacies, hotels or even non-commercial activities directly adjoining the industrial property are prohibited from maintaining such identification signs.

The Dewitt Ordinance is based on aesthetic considerations only. While aesthetics alone has frequently been adopted and accepted as a justifiable basis for the regulation of commercial signs, where an infringement upon basic constitutional rights is involved, it has been held that the burden falls upon the municipality to substantiate the relative merits of its interests vis-a-vis the constitutional rights being infringed upon. In *Metromedia, Inc., et al. v. City of San Diego, et al, 453 U.S. 490 (1981),* Mr. Justice Brennan, in his concurring opinion, stated:

> "But before deferring to a city's judgment, a Court must be convinced that the City is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors of an unattractive environment." *453 U.S. at 531.*

Appellants maintain that no rational basis exists for an aesthetically motivated ordinance, such as appellee's, to prohibit non-commercial property owners and lessees, as well as certain retail type commercial establishments, from maintaining permanent free-standing identification signs on their premises, while authorizing factories to maintain up to one thousand (1,000) square feet of free-standing signs each, particularly where both types of establishments or activities are located side-by-side in the same district. The same argument applies to shopping malls, vis-a-vis the small retail establishment or non-commercial property owner or lessee.

The discriminatory treatment inherent in the Ordinance takes this regulation out of the domain of time, place and manner restriction, and distinguishes between permissible and impermissible signs at a particular location by reference to content, i.e., what the sign purports to advertise, e.g., industrial activity or a shopping center -vs- non-industrial activity or a small retail establishment, or even a non-commercial message.

II

It is well established that commercial free speech is a protected right under the Constitution. *Bates, et al. v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia Pharmacy Board v. Virginia Consumer Council 425 U.S. 748 (1976).* Although some regulation may be placed on commercial speech, particularly as to time, place and manner of the commercial speech, the criteria to be applied in judging the validity of such governmental restrictions on commercial free speech, as adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980),* is a four part test: (1) The speech must concern legal activity and may not be misleading; (2) The restriction must seek to implement a substantial government interest; (3) The restriction must

directly advance that interest; (4) The restriction may not reach farther than necessary to accomplish the given objective.

As applied to the Dewitt Sign Ordinance, the Sign Ordinance satisfies tests one and two of the *Central Hudson* criteria, but falls short with respect to tests three and four.

As previously shown, the prohibition of permanent free-standing identification signs is not uniformly applied throughout the Town of Dewitt. Rather, certain commercial and industrial property owners and users are permitted substantial free-standing signs while others, including non-commercial owners and users, may not take advantage of such signs. The unequal treatment afforded by the Ordinance denigrates the appellee's purported interest in aesthetics and causes this Ordinance to fail the third *Central Hudson* test.

Similarly, appellants maintain that the Ordinance fails the fourth *Central Hudson* test in that it reaches farther than necessary to accomplish the given objective (i.e., aesthetics).

It has done this by the near total proscription of free-standing signs in the Town of Dewitt, with the few select exceptions, thus denying appellants an operative form of advertising. It should be emphasized, again, that whereas the San Diego Ordinance permitted on-site free-standing identification signs, the Dewitt Ordinance prohibits the appellants from maintaining such identification signs. The Court in *Metromedia* found that since on-site signs were permitted, that Ordinance did not reach farther than necessary to accomplish the given objective.

Likewise, in *Suffolk Outdoor Advertising Co., Inc., v. Hulse, 43 NY2d 483 (1977),* the distinction between accessory (on-site) signs and non-accessory (off-premises) billboard signs, was noted by the Court, stating:

> "Although permitting non-accessory billboards, the Ordinance permits the maintenance of accessory or on-

> premises billboards, thus providing an operative form of advertising". *43 NY2d at 490.*

Under the facts of this case, where such on-premises signs were legal when erected, and where the businesses grew in part as a result of such signs, the signs have become a part of the businesses themselves, just as the structures housing the businesses are part of them, and the authority to conduct the businesses in the district carries with it the right to maintain business signs on the premises. *(United Adv. Corp. v. Borough of Raritan, 11 N.H. 144).*

The Court of Appeals held that the appellants herein lacked standing to raise any constitutional First Amendment argument of overbreadth to challenge the Ordinance to the extent that it regulates non-commercial speech. However, in *Metromedia,* Mr. Justice Stevens, in his dissenting opinion, pointed out,

> "The only information in the record about on-site signs is that they 'advertise businesses, goods or services available on the property on which the sign is located'. There is no evidence that any on-site signs in San Diego of the permanent character covered by the Ordinance have ever been for non-commercial messages." *453 U.S. at 543.*

The Court in *Metromedia* found standing on the part of the billboard owners to challenge the San Diego Ordinance on free speech grounds although, as pointed out by Mr. Justice Stevens, there was no evidence in the record that non-commercial messages have even been placed on such billboards.

The *Metromedia* case was submitted to this Court on stipulated facts which established the interest of appellants therein in non-commercial speech.

In the case at bar, however, the parties have not stipulated as to the facts. Moreover, because of the summary dismissal of appellants' Complaint at the earliest stages of this action, appellants were precluded from establishing their interest in

non-commercial speech, as well as the impact this Ordinance has on appellants with respect to such non-commercial speech.

It was error for the Court below to deny appellants an opportunity to make such a record and then to point to the record as a basis for denying appellants standing on the issue of the constitutionality of the Ordinance as it applies to non-commercial speech.

By limiting the declaratory judgment to the constitutionality of this Ordinance as applied to commercial speech only, the Court of Appeals left open the question of the constitutionality of the Ordinance as applied to non-commercial speech. Standing should have been awarded to the appellants to raise that issue and the Court should have considered that issue on its merits.

III

The Sign Ordinance herein denies appellants their property without due process and without just compensation by the forced removal of their free-standing signs which were legal when erected and in which appellants made substantial investments.

The amortization period provided for in the Ordinance was apparently intended to permit the appellants, and others similarly situated, an opportunity to recoup their investments in the free-standing signs before having to remove them.

While the utilization of an amortization period in lieu of cash payment by the municipality to the property owner has become an accepted means of compensating the property owner for the removal of the sign, whether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case. *(Modjeska Sign Studios, Inc., v. Berle, 43 NY2d 468, 480 (1977))*. The factors which the Court in *Modjeska* deemed essential to consider in determining

whether an amortization period is reasonable included initial capital investment, investment realization to date and the life expectancy of the investment. The Court below in the case at bar never considered those factors but rather held the amortization period provided for in the Dewitt Sign Ordinance was reasonable as a matter of law.

The validity and reasonableness of an amortization period cannot be properly determined without the benefit of an evidentiary hearing at which the Court can become educated as to the costs involved, economic harm to be caused and the economic factors to be considered in arriving at a reasonable amortization period.

The Court below foreclosed the appellants from sustaining their position with respect to the unreasonableness of the amortization period by summarily rejecting the appellants' action without an evidentiary hearing on that issue. Similarly, the record does not disclose the studies, criteria or other factors, if any, which the appellee relied upon or followed in determining that the amortization period provided for was sufficient to permit appellants to recover their investments.

Such a determination by the Court below was tantamount to a taking of appellants' property without due process or just compensation. This is particularly so where, as here, the Dewitt Sign Ordinance does not provide for any specific administrative procedure for extending or otherwise challenging the amortization period.

Likewise, while aesthetics, per se, forms a valid basis for a zoning regulation, in order to be a valid exercise of the municipality's police power the Ordinance must be reasonable and conducive to the public health, safety, morals or general welfare of the regulating community. *Matter of Cromwell v. Ferrier, 19 NY2d 163 (1967).* The determination as to whether an Ordinance such as that in issue meets this test so as to be a valid exercise of the municipality's police power is a factual

determination based on the particular circumstances of the case and not one that can necessarily be decided on a motion for summary judgment.

In his concurring Opinion in *Metromedia, supra,* Mr. Justice Brennan, with whom Mr. Justice Blackmun joined, agreed that each Ordinance be viewed in light of the particular facts of each case. The San Diego Ordinance was founded on traffic safety. Mr. Justice Brennan pointed out that although bans on billboards in other areas may have had a bearing on traffic safety in those localities, he would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence in the *San Diego* case that standing billboards directly furthered traffic safety. Likewise, with regards to the Dewitt Sign Ordinance, although aesthetics may have been found to be a valid basis for such an Ordinance in other cases, there must still be a finding, based on evidence received at a hearing, that the Town of Dewitt is seriously and comprehensively addressing aesthetic concerns with respect to its environment by the enactment of this Ordinance. Because of the discriminatory application of this Ordinance, as shown above, one must seriously question the intent and purpose of this Ordinance, and that inquiry should be held through an evidentiary hearing.

CONCLUSION

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

HEIM, KOLDIN, CANTER & LEVINE
BY: Leonard C. Koldin, Esq.
Attorneys for Appellants
305 Montgomery Street
Syracuse, New York 13202